Supreme Court, U.S.
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No. 99-107

In The

Supreme Court of the United States

TERRY LUNDELL,

Petitioner,

vs.

DANIEL WATKINS and CYNTHIA WATKINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

A. The Questions Presented for Review and the Arguments Offered in Support Fail to Raise a Justiciable Issue or Apprise the Court and Respondent of the Specific Claims Advanced by the Petitioner 2

B. The Questions Presented by the Petitioner Were Not Timely Raised and Are Not Supported by the Clear Language of the Soldiers' and Sailors' Civil Relief Act of 1940 4

1. Petitioner Did Not Timely Apply to the District Court to Obtain Relief From the Default Judgment Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940..... 6

2. The Soldiers' and Sailors' Civil Relief Act of 1940 Does Not Apply to the Petitioner 7

C. Petitioner Has Not Identified a Conflict Among Lower Courts or an Important Federal Question Requiring This Court's Review..... 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Betha v. Martin, 188 F. Supp. 133 (E.D. Pa. 1960) 9

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) 12

Burgess v. Burgess, 234 N.Y.S.2d 87 (Sup. Ct. 1962) 10

Conroy v. Aniskoff, 507 U.S. 511 (1993)..... 8

Davidson v. General Fin. Corp., 295 F. Supp. 878 (N.D. Ga. 1968)..... 5

Driver v. Driver, 416 A.2d 705 (Conn. Super. Ct. 1980)..... 9

Flynn v. Great Atl. Management Co., 431 S.E.2d 327 (Va. 1993) 8

Garner v. United States, 424 U.S. 648 (1976)..... 4

Haner v. United States, 440 U.S. 1308 (1979)..... 4

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)..... 12

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27 (1993)..... 3

Krumme v. Krumme, 636 P.2d 814 (Kan. Ct. App. 1981)..... 7

LaMar v. LaMar, 505 P.2d 566 (Ariz. Ct. App. 1973) 7

Lang v. Lang, 25 N.Y.S.2d 775 (Sup. Ct. 1941)..... 9

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995)..... 3

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995)..... 6

Ostrowski v. Pethick, 590 A.2d 1290 (Pa. Super. Ct. 1991)..... 8

TABLE OF AUTHORITIES – Continued

Page

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 12

Snapp v. Scott, 167 P.2d 870 (Okla. 1946) 7

Swartz v. Swartz, 412 So. 2d 461 (Fla. Ct. App. 1982) 10

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 12

United States v. Hampshire, 892 F. Supp. 1327 (D. Kan. 1995) 5, 6, 8

Yee v. City of Escondido, 503 U.S. 519 (1992) 3

STATUTES

50 U.S.C.S. Appx. § 510 7

50 U.S.C.S. Appx. § 511 7

50 U.S.C.S. Appx. § 511(1) 7, 8

50 U.S.C.S. Appx. § 520 ..... 3, 4

50 U.S.C.S. Appx. § 520(1) 5

50 U.S.C.S. Appx. § 520(4) 6, 7, 8

50 U.S.C.S. Appx. § 521 ..... 3, 4

RULES

Federal Rule of Civil Procedure 60(b)(6) 1

Supreme Court Rules 10(a) and (c) 11

Supreme Court Rule 14.1(a) 2, 3, 4

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

R. Stern et al., *Supreme Court Practice* § 6.26 (6th ed. 1986) 2

Gary Knapp, Annotation, *Supreme Court's Construction and Application of Supreme Court Rule 14 (and Similar Predecessor Provisions), Prescribing Requirements of Petition for Certiorari*, 118 L. Ed. 2d 665 (1997) 4

STATEMENT OF THE CASE

Petitioner requests review of the Eighth Circuit's opinion affirming in part and reversing in part a decision denying relief from a default judgment under Federal Rule of Civil Procedure 60(b)(6). The underlying district court decision appealed to the Eighth Circuit awarded actual damages in the amount of $235,000.00 against Petitioner, Terry Lundell, and his wife, Stephanie Lundell. The district court awarded punitive damages in the amount of $3,500,000.00 against the Petitioner, Terry Lundell, and $117,500.00 in punitive damages against Petitioner's wife, Stephanie Lundell. The Eighth Circuit affirmed the award of actual damages against the Petitioner and his wife, but reversed the award of punitive damages by reducing the amount awarded against the Petitioner from $3,500,000.00 to $940,000.00. In addition, the Eighth Circuit eliminated the punitive damages awarded against the Petitioner's wife, Stephanie Lundell.

Following the Eighth Circuit's decision, the District Court entered judgment accordingly in favor of Respondents and against Petitioner for actual damages in the amount of $235,000.00 and punitive damages in the amount of $940,000.00. Thereafter, Petitioner filed a Petition for Writ of Certiorari requesting review by this Court.

REASONS FOR DENYING THE WRIT

There is no cause for this Court's review of the Eighth Circuit's decision because the petition is fundamentally flawed in several respects. First, Petitioner has

presented questions for review which are neither timely, nor in any way supported by the arguments offered as reasons to grant a writ. Second, the questions presented and arguments offered do not identify any conflict among either the United States courts of appeals or the federal district courts. Third, the questions presented and arguments offered do not identify an important federal question that has been improperly decided or otherwise warranting this Court's attention. Given these deficiencies, certiorari is not warranted on the grounds offered by the Petitioner.

A. The Questions Presented for Review and the Arguments Offered in Support Fail to Raise a Justiciable Issue or Apprise the Court and Respondent of the Specific Claims Advanced by the Petitioner.

Under Supreme Court Rule 14.1(a), a petitioner is required to include in the petition "the questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail." Furthermore, "any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions as set out in the Petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). The purpose of requiring a statement of the questions presented is to apprise the Court and the respondent of the issues to be reviewed. *See generally,* R. Stern et al., *Supreme Court Practice* § 6.26 (6th ed. 1986).

In the instant case, the questions presented for review are unclear and fail to apprise the Court and Respondent of the claims advanced. As stated in the

Petition, the questions presented are limited in scope to technical challenges under the Soldiers' and Sailors' Civil Relief Act of 1940 as codified at 50 U.S.C.S. Appx. §§ 520-21 (1996). Despite the limited scope of the questions presented, Petitioner has set forth various tangential supporting arguments which are unrelated and fail to address the grounds on which Petitioner seeks relief. It should be noted that the arguments enumerated by Petitioner in support of the questions presented are taken verbatim from the reply brief submitted by Petitioner in his appeal to the Eighth Circuit. With the exception of the argument challenging the punitive damage award, each of the arguments set forth by the Petitioner were found to be without merit by the Eighth Circuit. (Pet. for Cert. App. 7-8).

Although this Court has permitted exceptions to Supreme Court Rule 14.1(a) to consider issues beyond those contained in the questions presented, the arguments set forth in points I, II, and IV-X of the Petition do not properly advance claims in support, nor can the issues they raise be deemed "fairly included" therein. *See, e.g., Lebron v. National R.R. Passenger Corp.,* 513 U.S. 374, 379-383 (1995); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 30-34 (1993); *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992). Only the argument in point III of the Petition remotely concerns the federal statute providing the basis for the questions presented. (Pet. for Cert. App. 11-12). As will be discussed more fully in Part B below, even this argument fails to apprise either the Respondent or the Court of the requisite basis for obtaining review by this Court.

In declining to consider particular claims advanced in an accused's brief under provisions preceding Supreme Court Rule 14, authorities observing this Court's decisions have commented that "the failure of a petition to present with accuracy, brevity and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration is a sufficient reason for denying the petition." Gary Knapp, Annotation, *Supreme Court's Construction and Application of Supreme Court Rule 14 (and Similar Predecessor Provisions), Prescribing Requirements of Petition for Certiorari,* 118 L. Ed. 2d 665 (1997) (*citing Garner v. United States,* 424 U.S. 648, 656 (1976); *Haner v. United States,* 440 U.S. 1308, 1310 (1979)). Given the deficiencies of the Petition in clearly setting forth questions for review and arguments in support, the Court should deny the Petition for a Writ of Certiorari.

B. The Questions Presented by the Petitioner Were Not Timely Raised and Are Not Supported by the Clear Language of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner presents for the Court's review questions concerning the application of the Soldiers' and Sailors' Civil Relief Act of 1940 ("the Act") codified at 50 U.S.C.S. Appx. §§ 520-21 (1996). Specifically, Petitioner contends the Eighth Circuit Court of Appeals erred by (1) not setting aside the default judgment rendered against him based on Respondent's failure to file an affidavit attesting that Petitioner was not in the military service, and (2) by not requiring the Respondent to file a bond to indemnify

Petitioner against the judgment should the judgment later be set aside as specified in Section 520(1) of the Act.

Both of the questions presented are untimely and not properly before the Court. The sufficiency of the affidavit filed with the district court and its effect on the Petitioner's ability to obtain relief from the default judgment were raised by the Petitioner and addressed by the district court following the hearing on Petitioner's combined motions to set aside the default judgment. (Pet. for Cert. Appx. 30-34). Although the district court recognized the affidavit was insufficient under Section 520(1) of the Act, this violation was of insufficient gravity and merely made the default judgment voidable, not void. (Pet. for Cert. App. 32); *see, e.g., United States v. Hampshire*, 892 F. Supp. 1327, 1332-33 (D. Kan. 1995), *aff'd* 95 F.3d 999 (10th Cir. 1996), *cert. denied* 519 U.S. 1084 (1997); *Davidson v. General Fin. Corp.*, 295 F. Supp. 878, 881 (N.D. Ga. 1968). Additional elements necessary to obtain relief under the Act (i.e. timeliness, active duty in the military and prejudice) were not shown by the Petitioner. Consequently, the district court denied Petitioner relief from the default judgment. The district court's decision in this regard was never raised by the Petitioner in his appeal to the Eighth Circuit. As a result, it has not been preserved for consideration by this Court.

The second question presented, concerning posting of a bond by the Respondents, was never raised by the Petitioner before either the district court or the Eighth Circuit. Consequently, because this second question is presented for the first time in the Petition, it is not properly before the Court and should not be considered.

See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 456-57 (1995).

Notwithstanding the failure of Petitioner to preserve error, the arguments offered in support of the questions presented fail to set forth Petitioner's rationale for why these questions should be considered by the Court. As noted above, only point III in the Petition even remotely discusses the application of the Act. This argument merely addresses whether the Act applies and does not consider either of the questions presented. In addition to these inherent defects, the Petitioner's reliance upon the Act for relief is without merit because Petitioner did not apply for relief from the default judgment within the time prescribed under the Act, nor does the Act substantively apply to provide relief.

1. Petitioner Did Not Timely Apply to the District Court to Obtain Relief From the Default Judgment Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940.

For ease of reference and to avoid repetition, Respondents respectfully refer the Court to the factual and procedural background set forth in the report and recommendation of United States Magistrate Judge Ross A. Walters attached as Appendix "C", pages 20-26 to the Petition.

In order to obtain relief from a judgment under the Act, Petitioner was required to apply to the district court not later than ninety (90) days after the termination of any military service. 50 U.S.C.S. Appx. § 520(4) (1996); *Hampshire*, 892 F. Supp. at 1332 ("[E]ven if judgment

failed to comply with [a] requirement of the Act, the judgment is valid if the affected serviceman fails to have the judgment vacated pursuant to subsection (4)"). In the instant case, the default judgment was entered against Petitioner on January 16, 1994. The district court found that any relevant military duty of the Petitioner ended February 16, 1994. (Pet. for Cert. App. 30-31). However, it was not until July 6, 1995, well over one year following any military service, that Petitioner moved to set aside the default judgment. (Pet. for Cert. App. 4). This was well beyond the ninety (90) day deadline to file an application for relief. As noted by the district court, Petitioner knew during this entire period that he was in default and that a judgment could be entered against him. However, he took no action to protect any rights he may have had under the Act. (Pet. for Cert. App. 33). On this basis, any relief Petitioner wishes to obtain from this Court pursuant to the Act is time-barred.

2. The Soldiers' and Sailors' Civil Relief Act of 1940 Does Not Apply to the Petitioner.

Notwithstanding the lack of a timely application for relief, the substantive language of the Act would not afford the protection Petitioner seeks. To set aside the default judgment under the Act, Petitioner is required to show (1) he was on active duty in the military service of the United States at the time default judgment was entered, (2) he had a meritorious or legal defense to the action, and (3) he was prejudiced as a result of his military service. 50 U.S.C.S. Appx. §§ 510-11, 520(4); *LaMar v. LaMar*, 505 P.2d 566, 568-69 (Ariz. Ct. App. 1973); *Krumme v. Krumme*, 636 P.2d 814, 817 (Kan. Ct. App. 1981); *Snapp v.*

Scott, 167 P.2d 870, 873 (Okla. 1946); *Ostrowski v. Pethick*, 590 A.2d 1290, 1292 (Pa. Super. Ct. 1991); *Flynn v. Great Atl. Management Co.*, 431 S.E.2d 327, 329 (Va. 1993). It was concluded by the district court that the Act did not apply to provide relief. (Pet. for Cert. App. 30-34). On appeal, the Eighth Circuit did not even consider the issue, finding the argument to be without merit on its face. (Pet. for Cert. App. 8).

A prerequisite to setting aside the default judgment under Section 520(4) of the Act, is that the judgment be rendered while the Petitioner was a "person in military service during the period of such service or within thirty days thereafter." Under the Act, "person in the military service of the United States" includes:

> All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or Navy. *The term "military service", as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned* as well as training or education under supervisions of the United States preliminary to induction into military service. The terms "active service" or "active duty" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

50 U.S.C.S. Appx. § 511(1) (1996) (citations omitted and emphasis added). On its face, the Act is intended to reach and protect military personnel on "active duty." *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993); *Hampshire*, 95

F.3d at 1005, *Betha v. Martin*, 188 F. Supp. 133, 134-35 (E.D. Pa. 1960); *Driver v. Driver*, 416 A.2d 705, 706 (Conn. Super. Ct. 1980); *Lang v. Lang*, 25 N.Y.S.2d 775, 776 (Sup. Ct. 1941).

Petitioner was not on continuous active duty in the military service of the United States at the time the default judgment was entered against him. Between service of the Summons and Complaint on August 28, 1993, and the entry of default on November 23, 1993, Petitioner was engaged in some type of military activity on thirty-six days. (Pet. for Cert. App. 30). Between November 23, 1995, and the entry of judgment on February 16, 1994, Petitioner was involved with the military on thirty-three days. (Pet. for Cert. App. 30). Duty codes reviewed by the district court were unclear regarding the Petitioner's exact duty status. Giving the Petitioner the benefit of the doubt, the district court found that periodically during the relevant time Petitioner was on active duty with his unit the longest period of which was ten days. (Pet. for Cert. App. 30-31). Clearly, the time spent in the military service was insufficient to satisfy this first element.

Even assuming, as did the district court, that the first element is satisfied, Petitioner fails to demonstrate that the additional elements are satisfied. Neither the existence of a meritorious defense nor proof of prejudice have been shown. Petitioner's testimony at the time of the hearing on the combined motions to set aside default clearly indicates that he was not prejudiced by his military service. The district court's decision in this regard is informative:

> Though he worked frequently at his military job, most of the time he was not on active duty during the relevant period. He was not deployed for an extended period far from his home. He contacted an Iowa attorney to represent him (indeed, while on duty) but did not follow through with the information requested. He retained an Arizona attorney to attempt to negotiate with plaintiffs. He had appeared, defended and was prosecuting a counterclaim in the separate, related action in this court. He was carrying on his extensive farming business. He admitted that his military status did not prevent him from attending to his business or defending this action. As the Court has found, Mr. Lundell made a conscious decision not to defend this action.

(Pet. for Cert. App. 33-34) (citations omitted). Absent a showing of prejudice, Petitioner was not entitled to the protections of the Act. *See, e.g., Swartz v. Swartz,* 412 So. 2d 461, 462 (Fla. Ct. App. 1982) (default judgment against serviceman held proper where serviceman failed to appear; serviceman's rights were not prejudiced as a result of his military service, but from his own intentional and informed actions); *Burgess v. Burgess,* 234 N.Y.S.2d 87, 89 (Sup. Ct. 1962) (the Act was not intended to prevent judgment against a person in military service who was fully informed of the pendency of the action and had adequate time and opportunity to appear and defend or otherwise protect his right). The factual findings made by the district court coupled with the clear language of the Act on the various elements necessary to obtain relief dictate that a writ be denied.

C. Petitioner Has Not Identified a Conflict Among Lower Courts or an Important Federal Question Requiring This Court's Review.

This Court may grant a writ of certiorari for various reasons. However, two of the principal considerations governing the exercise of this Court's discretion to grant certiorari are (1) whether a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, or (2) whether a United States court of appeals has decided an important question of federal law that has not been settled by this Court or decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. Rules 10(a) and (c).

Neither of these considerations are raised or addressed in the Petition. First, Petitioner has not identified an intolerable conflict, let alone any conflict, between the decision of the Eighth Circuit and the lower courts on the interpretation or application of the Soldiers' and Sailors' Civil Relief Act of 1940 in the context of the questions presented. Furthermore, the numerous tangential arguments set forth by the Petitioner on various unrelated issues fail to identify conflicts deserving of resolution by this Court.

Second, the Petitioner has not identified an important question of federal law warranting review by this Court. In this case, the application of the Soldiers' and Sailors' Civil Relief Act of 1940, as well as the litany of additional arguments set forth by the Petitioner, are bound by the specific facts of this case. Any injustice stemming from

the errors alleged by the Petitioner turns on the application of existing law to the specific facts of this case and does not concern broader issues of public policy or violations of constitutional protections which may sometimes provide a basis for the Court's review.

In this case, the lower courts made every possible effort to ensure that the Petitioner's rights were protected. Before default was entered, the district court requested the report and recommendation of United States Magistrate Mark W. Bennett. Subsequently, when the Petitioner moved to set aside the default judgment, the district court requested a report and recommendation by United States Magistrate Ross A. Walters. Each of these reports and recommendations were adopted by United States District Court Judge Ronald E. Longstaff. Finally, the Eighth Circuit Court of Appeals reviewed the lower court decisions and upheld the judgment rendered against the Petitioner, but reduced the amount of punitive damages assessed following full consideration of the facts and analysis of this Court's recent precedent. (Pet. for Cert. App. 7-15); *see, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In fact, Judge Morris Sheppard Arnold dissented, stating that Petitioner was not entitled to relief and that the punitive damage award was proper under this Court's recent decisions. (Pet. for Cert. App. 15-16).

In sum, Petitioner has failed to provide any basis for this Court to exercise its discretion to grant certiorari. There has been no identification of a conflict, no error in interpretation or application of a federal statute and no

broader purpose necessitating consideration of the Petitioner's claims by this Court. As a result, a writ of certiorari should be denied.

CONCLUSION

For the reasons set forth in this Brief, this Court should deny the Petition for Writ of Certiorari as requested.

Respectfully submitted,

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